U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 November 2005

CASE NO.: 2004-BLA-6440

In the Matter of:

MERT E. PRIVETT, SR.,
Claimant

v.

CONSOL ENERGY, INC.,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

S.F. Raymond Smith, Esq.,
For the Claimant

Douglas A. Smoot, Esq.,
For the Employer

Before: RICHARD A. MORGAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a miner's duplicate claim for benefits, under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*., as amended ("Act"), filed on August 13, 2003, respectively. The Act and implementing regulations, 20 C.F.R. parts 410, 718, and 727 (Regulations), provide compensation and other benefits to:

1. Living coal miners who are totally disabled due to pneumoconiosis and their dependents;
2. Surviving dependents of coal miners whose death was due to pneumoconiosis; and,
3. Surviving dependents of coal miners who were totally disabled due to pneumoconiosis at the time of their death.

The Act and Regulations define pneumoconiosis ("black lung disease" or "coal worker's pneumoconiosis" ("CWP")) as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

PROCEDURAL HISTORY

The Claimant filed his prior claim for benefits on September 15, 1989. (Director's Exhibit ("DX") 1). On March 3, 1990, the district director denied the claim, finding no presence of pneumoconiosis. After a January 16, 1991 hearing, Administrative Law Judge Robert Shea denied benefits in a Decision and Order dated April 24, 1992.[1] On May 9, 1994, the district director denied a request for modification. Administrative Law Judge George A. Fath also denied the Claimant's request for modification on September 21, 1995, finding that no new evidence was presented to support a finding of pneumoconiosis. The Benefits Review Board ("BRB") upheld Judge Fath's decision on June 30, 1996.

The Claimant filed his current claim for benefits on August 13, 2003. (DX 3). On March 3, 2004, the claim was approved by the district director because the evidence established the elements of entitlement that the claimant had pneumoconiosis and was totally disabled due to pneumoconiosis. (DX 24). On March 11, 2004, the employer requested a hearing before an Administrative Law Judge. (DX 25). On June 15, 2004, the case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Program (OWCP) for a formal hearing. (DX 28). I was assigned the case on April 14, 2005.

Interim benefits were paid by the Black Lung Disability Trust Fund beginning August 1, 2003 and continuing to the present, in the amount of $823.50 per month with a lump sum payment of $4,845.10, for the period of August, 2003 through February, 2004. (DX 24).

A hearing was scheduled for September 29, 2005 in Charleston, West Virginia. By Order, dated September 21, 2005, claimant's request for a decision on the record was granted and that hearing was cancelled. No appearance was entered for the Director, OWCP. The parties were afforded the full opportunity to present evidence and argument. Claimant's exhibit ("CX") 1, Director's exhibits ("DX") 1-30, and Employer's exhibits ("EX") 1-4 are admitted into the record.[2]

ISSUES

I. Whether the miner has pneumoconiosis as defined by the Act and Regulations?
II. Whether the miner's pneumoconiosis arose out of his coal mine employment?
III. Whether the miner is totally disabled?
IV. Whether the miner's disability is due to pneumoconiosis?
V. Whether the miner has one dependent for the purpose of augmentation?

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[1] Judge Shea also based his decision on the absence of pneumoconiosis, stating, "I find the weight of the evidence of the record does not support a finding of the existence of pneumoconiosis, a valid element in the establishment of entitlement…" (DX 1).

[2] Employer also submitted exhibits numbered 5 and 6. These exhibits, however, are not admitted as they exceed the evidentiary limitations of 20 C.F.R. §725.414(a)(3)(i). For a full discussion of why these exhibits are excluded, see *infra* notes 15 & 19.

VI. Whether there has been a change in an applicable element of entitlement upon which the order denying the prior claim became final?

FINDINGS OF FACT

I. Background

A. Coal Miner

The claimant was a coal miner, within the meaning of § 402(d) of the Act and § 725.202 of the Regulations for 20 years. Claimant claims 21 ¾ years of coal mine work (DX 3). Employer does not contest this issue. However, it is the law of the case, based on the decision of Judge Fath, and the affirmation of that finding by the BRB, that the claimant be credited with 20 years of coal mine work.[3]

B. Date of Filing

The claimant filed his claim for benefits under the Act on August 13, 2003 (DX 3). None of the Act's filing time limitations are applicable; thus the claim was timely filed.

C. Responsible Operator

Itman Coal Company is the last employer for whom the claimant worked a cumulative period of at least one year and is the properly designated responsible coal mine operator in this case, under Subpart G. (DX 3).[4]

D. Dependents[5]

The claimant has one dependent for purposes of augmentation of benefits under the Act, his wife, Greta. (DX 1).

E. Personal, Employment, and Smoking History[6]

The claimant was born on November 2, 1934. (DX 3). He married Greta Warf on August 20, 1958. (DX 1). The claimant's last position in the coal mines was that of an electrician. (DX 4). His previous coal mine jobs included miner operator and roof bolter. (DX 1). All of the claimant's coal mine employment was underground and involved fixing equipment and carrying heavy equipment in low coal. (DX 1).

There is evidence of record that the claimant's respiratory disability is due, in part, to his history of cigarette smoking. The evidence is conflicting concerning the claimant's smoking

[3] Issues fully considered and decided in a prior opinion within the claim constitute the law of the case. *Dean v. Marine Terminals Corp.*, 15 B.R.B.S. 394, 396-97 (1983). Here, because Judge Fath credited the claimant with 20 years of coal mine work in an earlier decision, that finding is the law of the case. This court notes, though, that whether 20 or 21 years of coal mine employment is credited will not be outcome determinative in this case.

[4] Employer has not contested its status as Responsible Operator. (DX 28).

[5] See 20 C.F.R. §§ 725.204-725.211.

[6] "The Act, judicial precedent, the Regulations do not permit an award based solely upon smoking-induced disability." 65 Fed. Reg. 79948, No. 245 (Dec. 20, 2000).

history. However, I find that the claimant began smoking between the ages of 18 and 20 and stopped at the age of 63 and that his cigarette intake averaged between a half pack and a pack of per day.

DX 1 reflects various accounts of the claimant's smoking history. At the hearing before Judge Shea, counsel for both the claimant and employer attempted to clarify claimant's smoking history. After again presenting several accounts, claimant's counsel instructed claimant to be as accurate as possible, to which claimant replied that he began smoking at "[age] 18 or 20." (DX 1). In his opinion, however, Judge Shea did not specifically quantify that history. Similarly, in his opinion, Judge Fath determined only that the claimant smoked one pack per day, but did not state when the claimant began smoking. Nor did the BRB address the issue. (DX 1).

The evidence in the current claim is equally conflicting. In the Department of Labor ("DOL") examination, Dr. Norma Mullins reported that the claimant smoked an average of a half-pack of cigarettes from 1970-1997.[7] In his medical report, Dr. James Castle reported that, "[The claimant] started smoking when he was about 16 or 18 and stopped [in 1997]. He smoked about a pack of cigarettes daily." (EX 1).[8]

In resolving this conflict, the testimony of the claimant is most relevant. Unlike the doctors, the claimant has direct first-hand knowledge of his own smoking history; additionally, such testimony is under oath. Because the hearing was cancelled, however, such testimony is not available for the current claim. However, the claimant's testimony is available from the prior claim. Moreover, in his report, Dr. Castle stated that he reviewed all of evidence in the claimant's presence and directed the claimant "to interrupt and correct or change any information that I dictated that he disagreed with, felt was incorrect, or did not accurately reflect the facts." Dr. Castle reviewed the testimony before Judge Shea with the claimant in which the claimant stated the age at which he started smoking was between the ages of 18 and 20. There is no indication that the claimant objected to these facts in his interview with Dr. Castle. I find the claimant's silence under the circumstances constitutes a tacit admission of that fact and, consequently, an affirmation that he began smoking sometime between the ages of 18 and 20.[9]

In the DOL report, Dr. Mullins stated that the claimant stopped smoking in 1997. (DX 12). In his report, Dr. Castle reported that the claimant stopped smoking after he suffered a heart attack, which was eight years prior to his 2004 report. I find that there is no conflict in the evidence presented for the current claim on the point of when the claimant stopped smoking. Accordingly, I find that the claimant stopped smoking in 1997.

The record is equally convoluted as to the claimant's intake level. Dr. Mullins set it at half-pack per day. (DX 12). Dr. Castle stated that it is "about a pack per day." (EX 1). In his testimony before Judge Shea, the claimant stated that his intake varied between a half-pack and a

[7] If the claimant started smoking in 1970, his starting age would have been 36-year-old.
[8] Of the two admissible medical reports offered by the employer, only Dr. Castle personally examined and interviewed the claimant since the filing of the current claim.
[9] It should be noted that Dr. Castle also reviewed with the claimant medical reports that provided conflicting smoking histories. The claimant did not object to the information contained in these reports either. However, for the aforementioned reasons, I give more weight to the information provided by the claimant himself while testifying under oath before Judge Shea.

pack throughout his smoking history. Therefore, with nothing more exact on the record, I find that the claimant's smoking intake averaged between a half-pack and a pack.

II. Medical Evidence[10]

I incorporate by reference the summary of evidenced contained in Judge Fath's Decision and Order Denying Modification.[11] The following is a summary of evidence submitted since the final denial of the final claim.

A. Chest X-rays[12]

There were three readings of two X-rays, taken on September 3, 2003 and November 24, 2004. (DX 12, DX 14, EX 1). All of the readings are properly classified for pneumoconiosis, pursuant to 20 C.F.R. § 718.102(b).[13] One is positive by Dr. Manu Patel, who is Board-certified in radiology and a B-reader.[14] Two are negative, by Dr. Christopher Meyer, who is Board-certified in radiology and a B-reader, and Dr. James Castle, who is a B-reader. The admissible X-ray evidence is summarized in the table below.[15]

Exhibit Number	**Dates: X-ray/ Reading**	**Reading Physician**	**Qualifications**	**Film Quality**	**ILO Classification**	**Interpretation or Impression**
DX 12	9/03/03 9/03/03	Patel	B-reader Board certified	1	1/0	t,t All zones.

[10] *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004). (BRB upheld regulatory limitations on the admissibility of medical evidence, under the new 2001 regulations, i.e., 20 C.F.R. Sections 725.414 and 725.456(b)(1)).

[11] This opinion references all medical evidence contained in Judge Shea's Decision and Order Denying Benefits as well as medical evidence submitted subsequently.

[12] In the absence of evidence to the contrary, compliance with the requirements of Appendix A shall be presumed. 20 C.F.R. § 718.102(e)(effective Jan. 19, 2001).

[13] ILO-UICC/Cincinnati Classification of Pneumoconiosis – The most widely used system for the classification and interpretation of X-rays for the disease pneumoconiosis. This classification scheme was originally devised by the International Labor Organization (ILO) in 1958 and refined by the International Union Against Cancer (UICQ) in 1964. The scheme identifies six categories of pneumoconiosis based on type, profusion, and extent of opacities in the lungs.

[14] *LaBelle Processing Co. v. Swarrow,* 72 F.3d 308, 310 n.3 (3rd Cir. 1995). ("A "B-reader" is a physician, often a radiologist, who has demonstrated proficiency in reading X-rays for pneumoconiosis by passing annually an examination established by the National Institute of Safety and Health and administered by the U.S. Department of Health and Human Services. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51. Courts generally give greater weight to X-ray readings performed by "B-readers." *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n.16, 108 S.Ct. 427, 433 n.16, 98 L.Ed. 2d 450 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993).").

[15] Employer also submitted evidence of X-ray readings contained in the medical reports of Dr. Jerome Wiot, Dr Christopher Meyer, and Dr. Harold Spitz (In its submission to the Court, Employer labeled this evidence "EX 6."). Dr. Wiot's report contains his own reading of the September 3, 2003 X-ray. Dr. Meyer's report contains his own reading of the October 27, 2004 X-ray. Dr. Spitz's report contains his own reading of the October 27, 2004 X-ray. Evidence of these X-ray readings, however, exceeds the evidentiary limitations of 20 C.F.R. § 725.414(a)(3)(i). In its submission of this evidence to this Court, Employer acknowledged as much, but requested that it be admitted for "good cause," pursuant to 20 C.F.R.§ 725.456(b)(1). Employer, however, makes no argument to demonstrate why this evidence should be admitted under this standard. *See Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004) (holding that it is the "employer's burden to demonstrate good cause."). As such, the request to admit these medical reports is denied and the X-ray evidence contained therein is excluded.

DX 14	9/03/03 1/30/04	Meyer	B-reader Board certified	2		No abnormalities consistent with pneumoconiosis.
EX 1	10/27/04 11/24/04	Castle	B-reader	2		No abnormalities consistent with pneumoconiosis.

B. Pulmonary Function Studies[16]

Pulmonary Function Studies ("PFS") are tests performed to measure the degree of impairment of pulmonary function. They range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV). The PFS evidence is summarized in the table below.

Physician **Date** **Exhibit #**	**Age** **Height**	**FEV_1**	**MVV**	**FVC**	**Tracings**	**Comprehension** **Cooperation**	**Qualifying** **Conforming**	**Doctor's Impression**
Mullins 9/03/03 DX 12	69 68"	1.55		3.96	Yes	Good Good	Yes Yes	
Castle 10/27/04 EX 1	69 68"	Pre: 0.96 Post: 1.04*		Pre: 1.90 Post: 2.10	Yes		Yes Yes	

*Dr. Castle administered the PFS both before and after the application of bronchodilators.

For a miner of the claimant's height of 68 inches, § 718.204(b)(2)(i) requires an FEV_1 equal to or less than 1.76 for a male 69 years of age. If such an FEV_1 is shown, there must be in addition, an FVC equal to or less than 2.27 or an MVV equal to or less than 70; or a ratio equal to or less than 55% when the results of the FEV_1 tests are divided by the results of the FVC test.

[16] A "qualifying" pulmonary study or arterial blood gas study yields values which are equal to or less than the applicable table values set forth in Appendices B and C of Part 718. A study "conforms" if it complies with applicable standards (found in 20 C.F.R. § 718.103(b) and (c)). (*See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 (7th Cir. 1993)).

Both PFS tests qualify. The PFS conducted by Dr. Mullins qualifies because, although the FVC is higher than the statutory level, the FEV_1/FVC ratio is 39%. The PFS conducted by Dr. Castle qualifies as both the FEV_1 and FVC are below the requite levels.

C. Arterial Blood Gas Studies[17]

Blood gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood, expressed in percentages, indicates a deficiency in the transfer of gases through the alveoli which will leave the miner disabled. The results of the arterial blood gas studies submitted in connection with this claim are summarized in the table below.

Date **Exhibit #**	**Physician**	**PCO_2**	**PO_2**	**Qualify**	**Physician's Impression**
9/03/03 DX 12	Mullins	Resting: 38.4 Exercising: 43.7	Resting: 43.7 Exercising: 72.1	Resting: No Exercising: No	
4/23/04 CX 1	Khokar	36.9	41.7	Yes	
10/27/04 EX 1	Castle	33.8	45.3	Yes	Resting arterial blood gas OK; room air shows severe hypoxemia.

D. Physicians' Reports[18]

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis. 20 C.F.R. § 718.202(a)(4). Where total disability cannot be established, under 20 C.F.R. § 718.204(b)(2)(i) through (iii), or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or

[17] 20 C.F.R. § 718.105 sets the quality standards for blood gas studies. 20 C.F.R. §718.204(b)(2) permits the use of such studies to establish "total disability." It provides, "In the absence of contrary probative evidence which meets the standards of either paragraphs (b)(2)(i), (ii), (iii), or (iv) of this section shall establish a miner's total disability:…(2)(ii) Arterial blood gas tests show the values listed in Appendix C to this part…"

pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. § 718.204(b).

There are three admissible physicians' reports[19]

Dr. Mullins is certified in pulmonary and internal medicine. Her examination report was based on a September 3, 2003 examination of the claimant and the claimant's medical history. It noted 21 years of coal mine employment and smoking history from 1970-97 with a half-pack per day intake. (DX 12). Dr. Mullins stated that the claimant suffers from the following symptoms: sputum, wheezing, dyspnea, cough, chest pains, orthopnea, and ankle edema.

Based on the aforementioned arterial blood gas study, PFS, and the positive chest X-read by Dr. Patel, Dr. Mullins diagnosed a chest X-ray consistent with coal dust exposure, coronary artery disease, and suprahilar mass, all of which constitutes a moderate ventilatory impairment, of which she attributed 50% to coal worker's pneumoconiosis and 50% to other causes. She opined that the claimant's pulmonary condition was related to his coal mine employment, family history, smoke inhalation, and other unspecified causes.

Dr. Castle is a B-reader and board certified in internal and pulmonary medicine. His report is based upon an examination of the claimant and review of medical records. (EX 1). He noted 21 ½ years of coal mine employment and a 45-pack year smoking history. Dr. Castle described the claimant's symptoms as severe shortness of breath, daily cough, sputum, and wheezing. In accordance with 20 C.F.R. § 725.414(c), the deposition transcript of Dr. Castle is also considered. (EX 4).

Based on his review of claimant's medical history, arterial blood gas study, a PFS, and the negative chest X-ray that he read, Dr. Castle diagnosed the claimant as having bronchogenic carcinoma, pulmonary emphysema, and severe airway obstruction with gas trapping and reduction in diffusing capacity.[20]

Of particular importance, Dr. Castle noted that the claimant had been diagnosed with lung cancer in the left lung approximately four months prior to his examination. The claimant had been receiving chemotherapy since that time.

Dr. Castle opined that the claimant's pulmonary condition was not related to his coal dust exposure but rather related primarily to his cigarette consumption, his history of cardiac disease, and the development and treatment of bronchogenic carcinoma. He attributed the claimant's emphysema to his cigarette consumption.

Dr. Castle attributed the suprahilar mass found by Dr. Mullins to the bronchogenic carcinoma, which was not yet diagnosed at the time of Dr. Mullins examination. He also attributed the difference in the arterial blood gas studies of September 3, 2003 and October 27,

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[18] Under the new 2001 regulations, expert opinions must be based on admissible evidence. *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004).

[19] Employer has submitted the physicians reports of Dr. David Rosenberg, Dr. Wiot, Dr. Meyer, and Dr. Spitz. It conceded that these submission exceed the evidentiary limitations in the Regulations but requests that they be admitted for good cause. For the reasons stated *supra* note 19, this request is denied; these reports are inadmissible.

[20] Dr. Castle noted that the latter was secondary to pulmonary emphysema. Dr. Castle additionally diagnosed coronary artery disease, abnormal electrocardiogram with atrial fibrillation, and secondary neuropathy.

2004 to the development and treatment of bronchogenic carcinoma in the claimant. Dr. Castle stated that the obstruction found in each PFS was caused by emphysema and aggravated by the bronchogenic carcinoma.

Dr. Castle further opined that there was insufficient evidence to support a finding of coal workers' pneumoconiosis.

Dr. Kirk Hippensteel, is a B-reader and is Board certified in internal medicine with a subspecialty in pulmonary disease. His consultation report, based upon his review of medical records, is dated May 11, 2005 (EX 2).[21] In accordance with 20 C.F.R. § 725.414(c), the deposition transcript of Dr. Hippensteel is also considered (EX 3).

Dr. Hippensteel did not note a specific amount of coal mine employment and noted the varied smoking history reflected in the record. He opined that the claimant's pulmonary condition was not related to his coal dust exposure but rather cigarette consumption.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Entitlement to Benefits

This claim must be adjudicated under the regulations at 20 C.F.R. Part 718 because it was filed after March 31, 1980. Under this Part, the claimant must establish, by a preponderance of the evidence, that: (1) he has pneumoconiosis; (2) his pneumoconiosis arose out of coal mine employment; and, (3) he is totally disabled due to pneumoconiosis. Failure to establish any one of these elements precludes entitlement to benefits. 20 C.F.R. §§ 718.202-718.205; *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26 (1987); and, *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 170 (4th Cir. 1997). The claimant bears the burden of proving each element of the claim by a preponderance of the evidence, except insofar as a presumption may apply. *See Director, OWCP v. Mangifest*, 826 F.2d 1318, 1320 (3d Cir. 1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 B.L.R. 1-1 (1986). Moreover, "[T]he presence of evidence favorable to the claimant or even a tie in the proof will not suffice to meet that burden." *Eastover Mining Co. v. Director, OWCP [Williams*, 338 F.3d 501 (2003), *citing Greenwhich Collieries [Ondecko]*, 512 U.S. 267 at 281.

Since this is the claimant's second claim for benefits, and it was filed on or after January 19, 2001, it must be adjudicated under the new regulations.[22] Although the new regulations

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[21] Dr. Hippensteel reviewed the records from claimant's prior claim, the medical reports of Dr. Mullins and Dr. Castle, the X-rays read by Dr. Patel, Dr. Meyer, and, Dr. Castle, the PFS tests by Dr. Mullins and Dr. Castle, and the blood gas studies by Dr. Mullins and Dr. Castle. He also reviewed the X-ray reading of Dr. Wiot. For the reasons stated *supra*, that reading is inadmissible as it violates the evidentiary limitations of 20 C.F.R. § 725.414. Any chest X-ray appearing in a medical report must be admissible under that provision. 20 C.F.R. § 725.414(a)(3)(i). Therefore, reference to Dr. Wiot's X-ray reading is hereby redacted from Dr. Hippensteel's report.

[22] Section 725.309(d)(For duplicate claims filed on or after Jan. 19, 2001)(65 Fed. Reg. 80057 & 80067):

> (d) If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see § 725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subpart E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (For the applicable conditions of entitlement for a miner, see §

dispense with the "material change in conditions" language of the older regulations, the criteria remain similar to the "one-element" standard set forth by the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994),[23] which was adopted by the United States Court of Appeals for the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997). In *Dempsey v. Sewell Coal Co. & Director, OWCP,* 23 B.L.R. 1-47 (2004), the BRB held that where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the Administrative Law Judge finds that "one of the applicable conditions of entitlement…has changed since the date upon which the order denying the prior claim became final." *See also* 20 C.F.R. Section 725.309(d); *White v. New White Coal Co., Inc*., 23 B.L.R. 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. Section 725.309(d)(2).

To assess whether a material change in conditions is established, the Administrative Law Judge must consider all of the new evidence, favorable and unfavorable, and determine whether the claimant has proven, at least one of the elements of entitlement previously adjudicated against him in the prior denial of claim, e.g. the presence of pneumoconiosis. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358 (4th Cir. 1996)(*en banc*) *rev'g* 57 F.3d 402 (4th Cir. 1995), *cert. den.* 117 S.Ct. 763 (1997); *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994); and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 B.L.R. 2-76 (3rd Cir. 1995).[24] *See*

725.202(d)). The applicability of this paragraph may be waived by the operator or fund, as appropriate. The following additional rules shall apply to the adjudication of a subsequent claim:
(1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
(2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, if the claim was denied solely on the basis that the individual was not a miner, the subsequent claim must be denied unless the individual worked as a miner following the prior denial. Similarly, if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.
(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death.
(4) If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim. However, any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim.
(5) In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final.

[23] Reiterated in *Grundy Mining Co. v. Director, OWCP[Flynn*], 353 F.3d 467 (6th Cir. 2003).

[24] *Allen v. Mead Corp*., 22 B.L.R. 1-61 (2000). In Circuits which have not addressed the standard applicable to duplicate claims, under 20 C.F.R. 725.309, the BRB overruled its position, in *Shupink v. LTV Steel Co.*, 17 B.L.R. 1-24 (1992), and adopted the position articulated in *Peabody Coal Co. v. Spese*, 117 F.3d 1001 (7th Cir. 1997)(*en banc*). That is, to establish a material change in conditions, a claimant must establish, with evidence developed subsequent to the denial of the earlier claim, at least one of the elements of entitlement previously adjudicated against him or her.

Hobbs v. Clinchfield Coal Co., 917 F.2d 790, 792 (4th Cir. 1990). If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Unlike the Sixth Circuit in *Sharondale,* the Fourth Circuit does not require consideration of the evidence in the prior claim to determine whether it "differ[s] qualitatively" from the new evidence. *Lisa Lee Mines*, 86 F.3d at 1363 n. 11. The Administrative Law Judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994) and *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308 (3rd Cir. 1995).

In *Caudill v. Arch of Kentucky, Inc.*, 22 B.R.B. 1-97 (2000)(*en banc on recon.*), the BRB held the "material change" standard of section 725.309 "requires an adverse finding on an element of entitlement because it is necessary to establish a baseline from which to gauge whether a material change in conditions has occurred." Unless an element has previously been adjudicated against a claimant, "new evidence cannot establish that a miner's condition has changed with respect to that element." Thus, in a claim where the previous denial only adjudicated the matter of the existence of the disease, the issue of total disability "may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions…"

The claimant's first application for benefits was denied because the evidence failed to show that the claimant had pneumoconiosis (DX 1).[25] Under the *Sharondale* standard, the claimant must show the existence of this element by way of newly submitted medical evidence in order to show that a material change in condition has occurred. If he can show that a material change has occurred, then the entire record must be considered in determining whether he is entitled to benefits.

B. Existence of Pneumoconiosis

Pneumoconiosis is defined as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment."[26] 30 U.S.C. § 902(b) and 20 C.F.R. § 718.201. The definition is not confined to "coal workers'

[25] This was the determinative point in both Administrative Law Judge decisions and the affirmation of the BRB.

[26] Pneumoconiosis is a progressive and irreversible disease; once present, it does not go away. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 151 (1987); *Lisa Lee Mines v. Director*, 86 F.3d 1358, 1362 (4th Cir. 1996)(*en banc*); *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-15 (3rd Cir. 1995). In *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (1999), the BRB held that aggravation of a pulmonary condition by dust exposure in coal mine employment must be "significant and permanent" in order to qualify as CWP, under the Act. In *Workman v. Eastern Associated Coal Corp.,* 23 B.L.R. 1-22 (2004)(order on recon)(*En banc*) the BRB ruled that because the potential for progressivity and latency is inherent in every case, a miner who proves the presence of pneumoconiosis that was not manifest at the cessation of his coal mine employment, or who proves that his pneumoconiosis is currently disabling when it was previously not, has demonstrated that the disease from which he suffers is of a progressive nature. In amending section 718.201, DOL concluded chronic dust diseases of the lung and its sequelae arising out of coal mine employment "may be latent and progressive, albeit in a minority of cases." *See* 64 Fed. Reg. 54978-79 (Oct. 8, 1999); 65 Fed. Reg. 79937-44, 79968-72 (Dec. 20, 2000); 68 Fed. Reg. 69930-31 (Dec. 15, 2003). ("Although every case of pneumoconiosis does not possess these characteristics, the regulation was designed to prevent operators from asserting that pneumoconiosis is never latent and progressive. 20 C.F.R. Section 718.201(c); *see National Mining Association, et al, v. Chao, Sec'y of Labor,* 160 F. Supp. 2d 47 (D.D.C. Aug. 9, 2001) *aff'd*, 292 F.3d 849 (D.C. Cir. 2002)(*"NMA")*, 292 F.3d at 863."); In *Midland Coal Co. v. Director, OWCP[Shores]*, 358 F.3d 486 (7th Cir. 2004). Seventh Circuit upheld DOL's 2001 definition of CWP as a latent and progressive disease. DOL's regulation, on this scientific finding is entitled to deference. It is designed to prevent operators from claiming CWP is never latent and progressive.

pneumoconiosis," but also includes other diseases arising out of coal mine employment, such as anthracosilisosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, progressive massive fibrosis, silicosis, or silicotuberculosis. 20 C.F.R. § 718.201.[27]

The term "arising out of coal mine employment" is defined as including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[28] Thus,"pneumoconiosis", as defined by the Act, has a much broader legal meaning than does the medical definition.

Hence, this broad definition "effectively allows for the compensation of miners suffering from a variety of respiratory problems that may bear a relationship to their employment in the coal mines." *Robinson v. Pickands Mather & Co./Leslie Coal Co. & Director, OWCP*, 14 B.L.R. 2-68, 2-78 (1990), 914 F.2d 35 (4th Cir. 1990) *citing, Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938 (4th Cir. 1980).

Thus, asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983).[29] Likewise, chronic obstructive pulmonary disease may be encompassed within the legal definition

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[27] Regulatory amendments, effective January 19, 2001, state:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.
>
> (Emphasis added).

[28] The definition of pneumoconiosis, in 20 C.F.R. section 718.201, does not contain a requirement that "coal dust specific diseases …attain the status of an 'impairment.' To be classified as 'pneumoconiosis.' The definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether or not the particular disease exists to such an extent as to become compensable is a separate question." *Clinchfield Coal v. Fuller*, 180 F.3d 622, 625 (4th Cir. June 25, 1999). Moreover, the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure." *Id* (citing *Warth v. Southern Ohio Coal Co.*, 30 F.3d 173, 175 (4th Cir. 1995)).

[29] In *Robinson*, however, while the BRB recognized the significance of these impairments, it also noted the need for medical evidence of record to link them to the claimant's coal mine employment.

of pneumoconiosis. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173 (4th Cir. 1995); *see also* 20 C.F.R. § 718.201(a)(2).

The BRB has adopted the Director's position to hold that "a transient aggravation of a non-occupational pulmonary condition is insufficient to establish pneumoconiosis as defined at Section 718.201." *Henley v. Cowan and Co*., 21 B.L.R. 1-148 (1999).[30]

The claimant has the burden of proving the existence of pneumoconiosis. The Regulations provide the means of establishing the existence of pneumoconiosis by: (1) a chest X-ray meeting the criteria set forth in 20 C.F.R. § 718.202(a)(1); (2) a biopsy or autopsy conducted and reported in compliance with 20 C.F.R. § 718.106; (3) application of the irrebuttable presumption for "complicated pneumoconiosis" found in 20 C.F.R. § 718.304; or (4) a determination of the existence of pneumoconiosis made by a physician exercising sound judgment, based upon certain clinical data and medical and work histories, and supported by a reasoned medical opinion. 20 C.F.R. § 718.202(a)(4).

In *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000), the Fourth Circuit held that the Administrative Law Judge must weigh all evidence together under 20 C.F.R. § 718.202(a) to determine whether the miner suffered from coal workers' pneumoconiosis. This is contrary to the BRB's view that an Administrative Law Judge may weigh the evidence under each subsection separately, i.e. X-ray evidence at § 718.202(a)(1) is weighed apart from the medical opinion evidence at § 718.202(a)(4). In so holding, the court cited to the Third Circuit's decision in *Penn Allegheny Coal co. v. Williams,* 114 F.3d 22, 24-25 (3d Cir. 1997) which requires the same analysis.

The claimant cannot establish pneumoconiosis pursuant to subsection 718.202(a)(2) because there is no biopsy evidence in the record. The claimant cannot establish pneumoconiosis under § 718.202(a)(3), as none of that sections presumptions are applicable to a living miner's claim filed after January 1, 1982, with no evidence of complicated pneumoconiosis. Therefore, in this case, the claimant can only establish the existence of pneumoconiosis based on X-ray evidence and/or medical reports.

1. Chest X-Rays

The X-ray evidence submitted since the final denial of the prior claim does not support a finding that the claimant has pneumoconiosis.

A finding of the existence of pneumoconiosis may be made with positive chest X-ray evidence.[31] 20 C.F.R. § 718.202(a)(1).

The qualifications of the physicians can serve as a basis for distinguishing between conflicting X-ray reports. Indeed, the Regulations provide that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports, consideration shall be given to the radiological

[30] As a result, the BRB concluded that the Administrative Law Judge erred in finding legal pneumoconiosis based upon medical opinions which diagnosed a temporary worsening of pulmonary symptoms due to exposure to coal dust, but no permanent effect.

[31] "There are twelve levels of profusion classifications for the radiographic interpretation of simple pneumoconiosis…*See* N. LeRoy Lapp, '*A Lawyer's Medical Guide to Black Lung Litigation*,' 83 W.Va. L. Rev. 721, 729-731 (1981)." Cited in *Lisa Lee Mines v. Director*, 86 F.3d 1358, 1359 n.1 (4th cir. 1996)(*en banc*).

qualifications of the physicians interpreting such X-rays." 20 C.F.R. § 718.202(a)(1). Readers who are Board-certified radiologists and/or B-readers are classified as the most qualified. Greater weight may be credited to the interpretation of a dually-qualified physician (i.e. B-reader and board-certified) over that of a B-reader. *See Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999).

In this case, the physicians' qualifications do not provide a determinative basis for crediting one X-ray interpretation over another. Dr. Patel, who read the September 3, 2003 X-ray as positive is board-certified and a B-reader. Dr. Meyer, who read the September 3, 2003 X-ray as negative, is also board-certified and a B-reader. Therefore, with respect to that X-ray, the qualifications of the physicians is not determinative in which interpretations should receive credit. Dr. Castle, who read the October 27, 2004 X-ray as negative, is a B-reader. There are no other admissible interpretations of that X-ray and, thus, no competing qualifications to consider.

The numerical superiority of the X-ray interpretations, when considered in concert with the context of those interpretations, however, does prove to be significant. The BRB has held that it is within the discretion of an Administrative Law Judge to rely on the numerical superiority of X-ray evidence. *Edmiston v. F & R Coal Co.*, 6 B.L.R. 1-65 (1990). The Fourth Circuit, however, viewed this approach with disfavor, stating that resolving a conflict by "counting heads" is "hollow." *Adkins*, 958 F.3d at 52. To that end, it elaborated on its position regarding numerical superiority in *Copley v. Arch of West Virginia*, No. 93-1940 (4th Cir. June 21, 1994). In that case, the Fourth Circuit invalidated a finding of an absence of pneumoconiosis because "the Administrative Law Judge merely counted up the total number of [positive and negative] interpretations without distinguishing between the…x-rays." *Id* at 1. The court further stated that in handling such conflicts properly, "x-rays should…be weighed in context to determine whether there is pneumoconiosis." *Id*. at 2.[32] Thus, numerical superiority alone is not outcome determinative; however, it may be significant when considered in conjunction with the context of the evidence.

Such is the case in this claim. Two interpretations of two x-rays are negative. One interpretation of one X-ray is positive. This alone cannot determine either the presence or absence of pneumoconiosis. However, when considering the context of the readings, the additional reading of the additional X-ray is relevant. To illustrate, there are two readings of the September 3, 2003 X-ray: one is positive and one is negative. These two readings respectively diminish the determinative value of the other. Yet, the negative reading of the October 27, 2004 X-ray exists as its sole admissible reading. That this unchallenged interpretation is a negative reading is particularly important as the burden for establishing the presence of pneumoconiosis remains with the claimant.[33] Therefore, in considering both the number and context of the X-ray evidence, the evidence fails to establish the presence of pneumoconiosis.

2. Medical Reports

The medical reports submitted since the prior denial likewise do not support a finding that the claimant has pneumoconiosis.

[32] *Accord*, *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1277 (7th Cir. 1993) ("Our cases permit the Administrative Law Judge to side with the majority or the minority only after carefully weighing the evidence.").
[33] *See supra* subsection A.

A determination of the existence of pneumoconiosis can be made if a physician, exercising sound medical judgment, based upon certain clinical data, medical and work histories and supported by a reasoned medical opinion, finds the miner suffers or suffered from pneumoconiosis, as defined in § 718.201, notwithstanding a negative X-ray. 20 C.F.R. § 718.202(a).

To be credited, a medical report must be both well-documented and well-reasoned. A "documented" report sets forth the clinical findings, observations, and facts on which the doctor has based the diagnosis. *Fields v. Director, OWCP*, 10 B.L.R. 1-19 (1987). A report is "reasoned" if the documentation supports the doctor's assessment of the miner's health. *Id*. Upon finding a medical report to be unreasoned, an Administrative Law Judge may reject it entirely or accord it diminished weight in crediting its conclusions. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989).

In this case, I find Dr. Mullins' report to be unreasoned. A report may be deemed unreasoned if the doctor fails to explain how the documentation supports the assessment of disability. *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1984). Dr. Mullins failed to offer such an explanation in her report. After listing the claimant's symptoms and test results, Dr. Mullins diagnosed the following: the claimant had a chest x-ray consistent with coal dust exposure, coronary artery disease, and a suprahilar mass. She stated that these conditions constituted a moderate ventilatory impairment, to which 50% could be attributed to coal workers pneumoconiosis and 50% to an unidentified other source. She further stated that the causes of this impairment were coal mine employment, smoking, family history, and an unknown source. Dr. Mullins, however, did not explain how the causes contributed to the impairment or how she arrived at the proportional attribution. As such, I find that she did not sufficiently explain how the documentation supports her conclusions.

Moreover, I find that Dr. Mullins' report is based on a faulty smoking history. A medical opinion may be discredited based on an inaccurate smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85 (1993). As noted, this court finds, as a matter of fact, that the claimant began smoking between the ages of 18 and 20 and stopped in 1997. In her report, however, Dr. Mullins states that the claimant smoked from 1970-1997. Thus, I find her account of the claimant's smoking history to be flawed. Because she cited smoking as a cause of the claimant's impairment, an accurate account of his smoking history is highly relevant in ascertaining the credible weight of her report. Because her report contains a faulty smoking history, it is discredited accordingly.

Finally, I accord Dr. Mullins' report less weight because it did not present a complete picture of the claimant's health. *See Stark v. Director, OWCP*, 9 B.L.R. 1-36 (1986). Specifically, Dr. Mullins' report does not include any reference to the claimant's lung cancer. This omission was through no fault of Dr. Mullins. Dr. Castle's report states that the claimant reported he was diagnosed with lung cancer approximately four months prior to Dr. Castle's examination, which would place this diagnosis in the middle of 2004. Dr. Mullins completed her report on September 14, 2003. Therefore, she could not have had access to this information. Still, the absence of this information undermines her conclusions, especially because she attributes 50% of the claimant's impairment to an unknown cause. It cannot be said with certainty that the lung cancer would have unmasked the identity of this unknown cause; however, because she did not consider it, her report is incomplete. Moreover, Dr. Mullins was unaware of Dr. Meyer's negative reading of the September 3, 2003 X-ray.

Therefore, I accord the report of Dr. Mullins diminished weight because it is not well-reasoned, contains a faulty account of the claimant's smoking history, and does not consider the claimant's lung cancer, a key element in his overall health. As such, the medical conclusions derived therefrom are discredited accordingly.

Conversely, Dr. Castle provided a well-documented and well-reasoned report. His documentation supports his conclusions. Dr. Castle stated that the claimant does suffer from a disabling respiratory impairment. He attributed this condition to tobacco smoke and pulmonary emphysema. He further stated that the claimant's condition has worsened due to the development and treatment of bronchogenic carcinoma. Dr. Castle further opined that the claimant does not suffer from coal workers' pneumoconiosis.

Dr. Castle cited the claimant's smoking history as the cause of the emphysema. He stated that the PFS results are indicative of tobacco-smoke emphysema. He also cited the claimant's personal history of cardiac disease as a cause for his pulmonary restrictions. Dr. Castle further stated that the claimant's chemotherapy treatment for his cancer has "caused him to have increased difficulty with respiratory symptoms." He explained that the most recent arterial blood gas study results are indicative of this conclusion.

With respect to pneumoconiosis, Dr. Castle stated that the October 27, 2004 X-ray was "distinctly abnormal." However, he attributed this abnormality to the claimant's bronchogenic carcinoma. Specifically, he characterized the abnormality as a left sided pulmonary infiltrate with probable left pleural effusion. He stated that such a condition is associated with the development and treatment of lung cancer, not pneumoconiosis.

Therefore, because Dr. Castle's report is well-documented and well-reasoned, his conclusions are credited.

Dr. Hippensteel's consultation report is also well-documented and well-reasoned. Dr. Hippensteel concluded, based on his review of the record, that the claimant does not have pneumoconiosis. He did state that the claimant has a "severe pulmonary impairment" but opined that this impairment is caused by the development of lung cancer. He attributed this cancer to cigarette smoking. Dr. Hippensteel further reasoned that this opacities found in the September 3, 2003 X-ray are not the type caused by pneumoconiosis.

While Dr. Hippensteel's report is well-documented and well-reasoned, its weight is moderately diminished because it largely references medical data from the prior claim. Such references do not make the report inadmissible. However, they do bear adversely on its relevance as the focus of this initial inquiry is whether the claimant now has pneumoconiosis where he did not at the time of the prior denial. Dr. Hippensteel did reference the test results provided by Dr. Patel, Dr. Mullins, and Dr. Castle and the reports provided by Dr. Mullins and Dr. Castle, all of which were submitted in connection with the current claim. Therefore, I accord Dr. Hippensteel's report credit insofar as it relates to the medical evidence submitted in connection with the current claim.

In sum, I find Dr. Castle's report to be worth the most weight because it is well-documented, well-reasoned, and presents a complete picture of the claimant's health. Dr. Hippensteel's report is accorded moderate weight because it is well-documented and well-reasoned, but primarily addresses evidence not relevant to the initial inquiry. I accord Dr.

Mullins' report the least weight because it is not well-reasoned, is premised on a faulty smoking history, and does not present a complete picture of the claimant's health. As such, the physician opinions do not support a finding of coal workers' pneumoconiosis.

After weighing the X-ray evidence and physician opinions together, I find the claimant has not met his burden of proof in establishing the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) *aff'g sub. nom. Greenwich Colleries v. Director, OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993).

Because the prior claim was denied due to a finding of no pneumoconiosis, the claimant is unable to establish a material change in conditions. As such, he is unable to establish an entitlement to benefits in this claim.

C. Other Elements

To establish entitlement for benefits under the Act, a claimant must also prove that pneumoconiosis was caused by coal mine employment, total disability, and that pneumoconiosis was the cause of total disability. However, because I find no presence of pneumoconiosis, and thus no material change since the prior denial, it is not necessary to consider whether the claimant can establish these elements of his claim.

ATTORNEYS FEES

The award of attorney's fees, under the Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim.

CONCLUSIONS

In conclusion, the claimant has not established that a material change in condition has taken place since the previous denial. Specifically, the initial case was denied because it was found that the claimant did not have pneumoconiosis as defined by the Regulations. In this claim, I similarly find that the claimant has not established the existence of pneumoconiosis as defined by the regulations. Therefore, he is not entitled to benefits.

ORDER

It is ordered that the claim of MERT E. PRIVETT, SR. for benefits under the Black Lung Benefits Act is hereby DENIED.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS (Effective Jan. 19, 2001): Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board before the decision becomes final, i.e., at the expiration of thirty (30) days after "filing" (or **receipt by**) with the Division of Coal Mine Workers' Compensation, OWCP, ESA, ("DCMWC"), by filing a Notice of Appeal with the **Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, D.C. 20013-7601.**[34] At the time you file an appeal with the Board, you **must also send a copy** of the appeal letter **to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210**. *See* 20 C.F.R. § 725.481.

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

If an appeal is not timely filed with the Board, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).

[34] 20 C.F.R. § 725.479 (Change effective Jan. 19, 2001). (d) Regardless of any defect in service, **actual receipt** of the decision is suffice to commence the 30-day period for requesting reconsideration or appealing the decision.